No. 13,005

IN THE

United States Court of Appeals

For the Ninth Circuit

MINER LII and ALICE LII,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the Territory of Hawaii.

APPELLANTS' REPLY BRIEF.

O. P. SOARES,
Union Trust Building, Honolulu, Hawaii,
Attorney for Appellants.

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STATEMENT OF JURISDICTION.

The statement of jurisdiction in Appellee's brief not only fails to refute Appellants' claim of lack of jurisdiction in the trial Court, but fails to show that that Court had jurisdiction.

In its attempt to show jurisdiction Appellee says that "Section 2421 is the section under which these defendants stand convicted" (Appellee's Brief, p. 3), and that "a violation of Section 2421, Title 18 United States Code is a continuing offense" (Appellee's Brief, p. 2). The defendants were not indicted, nor were they, nor could they have been convicted of all the offenses described in Section 2421 some of which may

well be "continuing offenses". The indictement is in only one count and charges but one offense, namely: that the defendants "did knowingly, wilfully, unlawfully and feloniously procure and obtain a ticket from the office of Pan-American World Airways at 222 Stockton Street, San Francisco, California to be used by a woman, namely, Sara Wright, in interstate commerce in going from San Francisco, California, to the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court for the purpose of prostitution, debauchery and other immoral purposes".

Section 2421 sets up at least two separate and distinct crimes each complete in itself.

(1) The act of transporting; and (2) procuring a ticket to be used in going to any place for purposes of prostitution or debauchery.

It is with the commission of the second of these crimes that defendants are charged.

Contrary to Appellee's assertion (Appellee's Brief, p. 3), this Court did not hold in *Rodd v. United States,* 165 F. (2d) 54, "that a question of venue, if not raised until appeal, comes too late". The question involved in that case was a defective indictment, consisting of its failure to allege venue. There was involved no question of the facts failing to establish jurisdiction.

The criminal act complained of was shown by the evidence to have been completed in a city within the jurisdiction of the trial Court. In the case at bar the act complained of and as proved was completed in a city not within the jurisdiction of the trial Court.

A distinction is to be drawn between the failure of the indictment to allege venue (as in *Rodd v. United States,* supra) and clear proof showing that the trial Court was without jurisdiction. The chief distinction being that a question of jurisdiction may be raised at any time, even by the Appellate Court in its own motion.

BRIEF OF THE ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY THAT JURY IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL.

Appellee's suggestion that the jurors finally selected to try the case were not in the courtroom at the time of defendants being sentenced and taken into custody is a bit far-fetched. Notwithstanding Appellee's assertion that "there is no way of knowing if the jurors finally selected were in the courtroom at that time" (Appellee's Brief, p. 5), the Appellee actually pointed the way on the very next page of its brief wherein is set forth an express finding by the trial judge that they were.

The record beginning on page 27 shows that the jury which was impaneled and sworn was addressed by the presiding judge who said, among other things:

> You were present when the Court had been aggrieved by their (defendants') failure to be here at the time set for trial and the Court found them in contempt, guilty of contempt, and punished them. (R. p. 28.)

Though Appellee asserts (Appellee's Brief, p. 7), "There is certainly no showing that the Court intended or calculated that his remarks would prejudice the jury," the use by the judge of the word "aggrieved" in the passage cited above is significant of his personal feeling in the matter.

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN PERMITTING EVIDENCE OF THE ACTION OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE COMMISSION OF THE CRIME ALLEGED IN THE INDICTMENT, THE COMMISSION OF SAID CRIME HAVING BEEN COMPLETED IN SAN FRANCISCO AND BEFORE THEIR ARRIVAL IN HONOLULU.

The cases cited by Appellee are not helpful in deciding the question raised by specified error No. 2 for the reason that they relate to the charge of *transporting,* the first of the two crimes included in Section 2421, a continuing offense, whereas the only crime for which defendants were on trial was the second crime described in Section 2421: a crime complete in itself and not dependent on whether the purpose for which the tickets were procured and obtained was effectuated. Had the evidence shown that the defendants merely procured and obtained the tickets under the circumstances testified to as occurring in San Francisco, and had the evidence shown nothing else,—in other words, had the evidence objected to not been admitted,—the commission of the crime would have been established completely. The evidence received over defendants' objection here complained of could serve no need-

ful purpose other than to create a harmful prejudice against the defendants in the minds of the jurors.

SPECIFICATION OF ERROR NO. 5

THE COURT ERRED IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT, ALTHOUGH THE JURY WAS EXCLUDED, (WHILE) DEFENDANTS-APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX.

The prejudice to the defendants arising out of the Court's permitting the prosecutrix to remain while defense counsel indicated what he expected to elicit from her arose out of her character and her attitude on the witness stand, which attitude was shown by her interruption of defense counsel while he was making the offer of proof, calling forth from the judge a stern reproach.

> The Court. Well, you keep out of it. You will get your chance later. (R. p. 54.)

SPECIFICATION OF ERRORS NOS. 6 AND 7.

THE COURT ERRED IN UNDULY LIMITING THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX AND IN UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZING THE CROSS-EXAMINATION.

THE COURT ERRED IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS ON CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER AND CRIMINAL ACTIVITIES OF SAID WITNESS.

Appellee answers Appellants' argument in support of their claim of error under these two specifications by setting out the remarks of the Court complained

of in *Goldstein v. United States,* 63 F. (2d) 609 (Appellee's Brief, p. 13) and in a series of cases cited in the appendix to the brief.

In each case cited the remarks complained of were drawn forth by the clear misconduct of defense counsel, such as attempting to bring in hearsay and not evidence; repeatedly asking questions which the Court had clearly ruled improper; consuming time in statements, and not properly making objections, and improper deportment on the part of defense counsel.

In the case at bar no criticism of counsel's conduct was offered by the Court. Notwithstanding which, by insisting that counsel confine himself in cross-examining a witness to matters brought out on direct, the Court intimated that cross-examination of the witness as to her morals and bad character for the purpose of attacking her credibility was "so-called cross-examination", that is, implying doubt as to its correctness or propriety; not genuine, fake; in short, "phoney". This could not but have an unfavorable effect on the jury.

Further in view of the witness's evasiveness, her manner of testifying which aggravated the Court and the United States attorney alike to the extent that both from time to time felt called upon to admonish her, an arbitrary time-limit of ten minutes such as the Court fixed, was prejudicial.

Appellee's theory seems to be that for error such as here complained of to be prejudicial, defendants have the burden of establishing that the verdict would of necessity have been favorable but for the prejudi-

cial conduct complained of, and cites *Allred v. United States,* 146 F. (2d) 193, in support of that theory.

Allred v. United States, supra, does not support any such broad statement of law as Appellee attributes to it. This Court merely held in the *Allred* case that mere refusal of the trial Court to permit a witness to "snip the lining of a coat (already in evidence) a little in the back", "to see if the witness could identify her work", even though it be assumed to be error, was not, of itself such error as to require a reversal.

SPECIFICATION OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT MINER LII.

Appellee lists 10 places in the Record setting forth what Appellee says was "evidence adduced against the defendant Miner Lii". Except in one significant instance which will be hereinafter pointed out, the list contains a correct resume of the record appearing on the pages referred to. However, with the exception referred to in the last preceding sentence, none of it is evidence of the commission of the crime with which the defendant Miner Lii stood charged (whatever may be said as to its being evidence against the defendant Alice). We must bear in mind that the charge against the defendant Miner Lii was not "white slavery" generally but was specifically that he violated a single provision of the section, namely: knowingly procuring a ticket to be used in going to any place for purposes of prostitution and debauchery.

In number 9 in Appellee's list of items of evidence, Appellee says the Record on page 41 discloses that defendant, Miner Lii, not only promised the prosecuting witness that he would pay her way and that he did, in fact, pay her way. There is nothing recorded on that, or any other page of the Record, that Miner Lii paid "her way". Nor is there a scintilla of evidence to the effect that Miner Lii procured or obtained a ticket for Sara Lee Wright.

SPECIFICATION OF ERROR NO. 9.

THE COURT ERRED IN NOT PERMITTING DEFENDANTS-APPELLANTS TO ELICIT CORROBORATION OF TESTIMONY CONTRADICTING TESTIMONY THERETOFORE GIVEN BY PROSECUTRIX.

Appellee contends that the error here complained of is not in fact error for the reason that the offer of proof was "based on nothing other than hearsay". The Record does not bear out this statement. On the contrary, the offer contained the express statement that the corroboration sought to be made would be made without the use of hearsay.

The credibility of the prosecuting witness was a vital issue in the case. Here credibility was subject to attack both because of her low morals and her denials of facts that tended to show that she was a confirmed prostitute. The witness Lewis was called for that purpose. An attempt to cast doubt on his testimony was made by the cross-examiner. The corroborating evidence sought would have tended to remove that doubt.

CONCLUSION.

The foregoing is strictly in *reply* to Appellee's brief. In making this reply, Appellants have attempted to refrain from reiterating argument offered in their opening brief. For that reason some of the specifications of error have not been adverted to. They have not been abandoned.

Dated, Honolulu, Hawaii,
February 27, 1952.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellants.